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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 511.

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Petitioners,

v.

THE CITIZENS NATIONAL BANK IN ABILENE.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANT OF CERTIORARI.

TOM K. EPLEN,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No Writ of Certiorari should be granted in this case because: (1) No federal question is involved; (2) If there were, it was not timely raised in the state court; and (3) The judgment rendered by the Supreme Court of Texas was a correct one.

ARGUMENT UNDER FIRST AND SECOND POINTS.

As exemplified by the opinion of the Supreme Court of Texas (R. 127), this case turned solely on the construction given the 6th Paragraph of the construction contract (R. 32), which recited in substance that the contractor should be paid in full when he had furnished written evidence that he had paid all construction bills. In the trial court the materialmen relied only on asserted liens (see their pleadings—R. 6, 10, 13). The Railway answered only (R. 24) that such paragraph created a condition precedent render-

ing the Bank's action premature. The decision of the Court of Civil Appeals turned solely on the construction of the contract (R. 68). No contention was made by any party that a federal question was involved, prior to the Motion for Rehearing by the Railway in the Supreme Court of Texas (R. 143). It now cites *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641, to support its contention that the state court's majority opinion represents "arbitrary and capricious" exercise of power, but the same case holds that even if such opinion was erroneous, it does not deprive the Railway of any rights under the due process clause of the Federal Constitution. No authorities presenting analogous facts are presented by Petitioners. If Respondent correctly interprets them, the following authorities clearly indicate that no federal question is presented in the instant case, and that the attempt to raise same in the Motion for Rehearing is insufficient: *Herndon* v. *Georgia*, 295 U. S. 441-443, 79 L. Ed. 1530, 1532; Annotation 79 L. Ed. 1539, 1541; —— U. S. C. A., Title 28, Sec. 344, Note 49, page 231. The grounds upon which the state court decided this case are clear, with no uncertainty involved, and as we understand, this Court should decline to review on certiorari under the rule announced in *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 555, 84 L. Ed. 920, 923; and authorities collated in Annotation 84 L. Ed. 925.

ARGUMENT UNDER THIRD POINT.

The Supreme Court of Texas rendered a correct judgment. It has been held before that such contractual provisions inure solely to the benefit of the owner and vest no rights in third parties. 40 C. J. 365, Sec. 500; *Getty* v. *Pennsylvania Institution* * * *, 194 Pa. 571, 45 Atl. 333; *In Re H. A. Moore Co., Inc.*, 31 F. (2) 321; *Southern Surety Co.* v. *Bering Mfg. Co.*, 295 S. W. 337, Texas—Galveston Ct. Civ. Apps. Petitioners cite no authorities to the contrary Subject contract did not authorize the Railway to utilize the retained fund *to pay materialmen provided the*

contractor so defaulted, as was true in such cases as *Central State Bank* v. *U. S. F. & G. Company, Et Al.,* 9 F. (2d) 326.

Under the Texas law the assignment by the contrator to Respondent Bank, approved by the Railway, vested legal title in the Bank as to all monies due the contractor, so soon as earned. *Clay-Butler Lumber Co.* v. *W. H. Pickering Lumber Co.,* 276 S. W. 664; *City National Bank of Beaumont* v. *American Surety Co. of New York,* 52 S. W. (2d) 259. The majority opinion (R. 127) clearly proceeds on the theory that subject contract is without ambiguity, Petitioners' implications to the contrary notwithstanding. Justice Sharp, in his dissent (R. 134), admits that he does not consider that the instant contract vested any rights in the materialment which they could enforce themselves (R. 139). He cites no authorities to sustain his view, and his theory of permitting a third party beneficiary to recover when vested with no right of action by the contract, suggests a new and novel theory in contract law. The materialmen had the right under the Texas statutes to fix liens, taking priority over the Bank's assignment, but they admittedly perfected none. The Railway got everything it contracted for in this case, for which it owed money, and the Texas Supreme Court concluded that the contractual provision, for the sole protection of the Railway, had served its purpose; that the Railway should not be permitted to keep the money itself, and that Respondent Bank was entitled to the fund under its assignment because Intervenors failed to perfect any lien, and the contract vested no rights in them. We submit that such conclusion was the only sound and logical one to be reached, and the decision was a correct one.

It is therefore respectfully submitted that this case is not a proper one for review in this Court and that the Petition for Writ of Certiorari should be denied.

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Counsel for Respondent.